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Homecomings Financial Network

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

11 | Rosa Galindo; Maria Galindo,) Case No. 3:07-CV-3991 MJJ

12 | Plaintiffs,

13

14 Financo Financial, Inc.; Patrick
Patchin; Ahmed Yama Asefi; Aaroon
15 Sadat and Nazia Nawabzada;
Countrywide Bank, N.A.;
16 Countrywide Financial Corp.;
Homecomings Financial Network;
17 Commonwealth Land Title Company;
Joseph Esquivel; Pamela Spikes; and
18 Does 1-100.

19 Defendants.

Case No. 3:07-CV-3991 MJJ

**DEFENDANT HOMECOMINGS
FINANCIAL, LLC'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS CLAIMS
FROM PLAINTIFFS' SECOND
AMENDED COMPLAINT**

[RULE 12(b)(6)]

DATE: February 26, 2008
TIME: 9:30 a.m.
PLACE: Courtroom 11

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1 **Rules**

2 FEDERAL RULE OF COURT, RULE 12(b)(6) 3

1 **I. INTRODUCTION**

2 Plaintiff Rosa Galindo¹ re-financed two investment properties in Hayward,
 3 California in 2006, extracted nearly \$500,000 to build another investment property
 4 in Tracy, California, and has now sued Homecomings Financial, LLC
 5 (“Homecomings”) under myriad theories relating to her mortgages. However, for
 6 five of her claims, she has not established that she is entitled to relief. Her: 1)
 7 Second Claim for Negligence; 2) Third Claim for violation of the Truth In Lending
 8 Act (“TILA”); 3) Fourth Claim for violation of the Real Estate Settlement
 9 Procedures Act (“RESPA”); 4) Ninth Claim for Violation of the Consumers Legal
 10 Remedies Act (“CLRA”); and 5) Twelfth Claim for Civil Conspiracy fail to state
 11 facts upon which relief can be granted. Her negligence claim fails because she
 12 cannot maintain a tort claim when the relationship between her and Homecomings is
 13 governed by a contract. Her TILA claim is barred by the statute of limitations. Her
 14 TILA and RESPA claims also fail because the loan transactions were for business
 15 purposes, not consumer transactions. Her CLRA claim fails because the statute does
 16 not cover mortgage loans. And finally, her civil conspiracy claim fails because no
 17 such independent claim exists and she has not alleged a tort or any wrongful act
 18 attributable to Homecomings. The above claims should be dismissed, without
 19 allowing her leave to amend.

20 **II. ALLEGATIONS SET FORTH IN THE SECOND AMENDED**
 21 **COMPLAINT**

22 Plaintiffs allege 17 causes of action against various defendants. However,
 23 only a few have been alleged against Homecomings, and those claims only involve
 24 Rosa Galindo. (*See, e.g.*, SAC ¶¶13, 14.) Rosa Galindo has alleged the following

25
 26
 27 ¹ Plaintiff Maria Galindo has not alleged she was involved in any transactions with
 28 Defendant Homecomings Financial, LLC and, therefore, has not sued
 Homecomings.

1 claims against Homecomings: 1) Second Claim for Negligence; 2) Third Claim for
 2 violation of TILA; 3) Fourth Claim for violation of RESPA; 4) Ninth Cause of
 3 Action for Violation of the CLRA; 5) Twelfth Claim for Civil Conspiracy; 6)
 4 Sixteenth Claim for violation of California BUSINESS AND PROFESSIONS CODE
 5 §17200; and 7) Seventeenth Claim for violation of California CIVIL CODE §1921.

6 Rosa Galindo owns both a fourplex at 4646 Sheppard Avenue and a house on
 7 27590 Manon Avenue in Hayward, California. (SAC ¶13.) She allegedly began
 8 receiving solicitations from mortgage brokers and agents (not Homecomings) to
 9 refinance the two properties. (SAC ¶13.) She planned to refinance the properties to
 10 obtain money to build a house in Tracy. (SAC ¶13.) Allegedly, Defendant
 11 mortgage broker Patchin came to Rosa Galindo with loan papers, rushed her into
 12 signing them and misrepresented and failed to discuss the true terms of the loans.
 13 (SAC ¶14.) Escrow on the loans closed on May 23, 2006. (SAC ¶14.)

14 Like many real estate speculators in 2006, Rosa Galindo was eager to
 15 leverage her existing investment properties to buy/build more property. She
 16 intended to use the re-finance funds from the houses to build a house in Tracy,
 17 California. (SAC ¶13.) Now however, she includes Homecomings with a group of
 18 other defendants and alleges a whole host of wrongdoings such as she allegedly
 19 never received copies of certain signed documents from the Defendants. (SAC ¶14.)
 20 Allegedly, the loans Rosa Galindo received did not have the same terms Defendant
 21 Patchin had stated to her earlier. (SAC ¶14.) Homecomings allegedly owed a duty
 22 of care to Plaintiffs to refrain from maintaining abusive lending practices and
 23 marketing abusive loan products. (SAC ¶28.) Homecomings allegedly breached its
 24 duty by failing to verify the name and license of brokers that sold loan products for
 25 it. (SAC ¶28.) Homecomings allegedly is a creditor within meaning of the TILA
 26 and violated the statute by failing to provide Plaintiffs with the required disclosures.
 27 (SAC ¶34.) Allegedly, any statutes of limitations were tolled. (SAC ¶34.) The
 28 loans between Rosa Galindo and Homecomings allegedly are federally regulated

1 mortgages subject to RESPA. (SAC ¶39.) The fees Rosa Galindo paid to
 2 Homecomings were allegedly unlawful, were kickbacks and not related to the
 3 services performed by the Defendants as required by RESPA. (SAC ¶¶40-41.) The
 4 loans allegedly constitute a service sold to Rosa Galindo for personal, family or
 5 household purposes. (SAC ¶83.) Homecomings allegedly paid kickback fees to
 6 Financo so that Financo would sell the loan products. (SAC ¶87.) Homecomings
 7 allegedly conspired against Rosa Galindo to accomplish an unlawful action by
 8 misrepresenting the actual nature and terms of the loans. (SAC ¶104.)
 9 Homecomings allegedly violated Business and Professions Code §17200 by failing
 10 to inform Rosa Galindo of the loan product available to her, failing to meet the
 11 RESPA requirements, violating the CLRA, violating the Fair Employment and
 12 Housing Act (California GOVT. CODE §12955 *et seq.*), and other violations of law.
 13 (SAC ¶118.) Homecomings allegedly failed to provide Rosa Galindo with a copy of
 14 the “Consumer Handbook on Adjustable Rate Mortgages.” (SAC ¶122.)

15 **III. THE SPECIFIED CLAIMS AGAINST HOMECOMINGS SHOULD BE**
 16 **DISMISSED BECAUSE THEY DO NOT STATE A BASIS FOR RELIEF**

17 Homecomings moves to dismiss the 1) Second Claim for Negligence; 2)
 18 Third Claim for violation of TILA; 3) Fourth Claim for violation of RESPA; 4)
 19 Ninth Cause of Action for Violation of the CLRA; and 5) Twelfth Claim for Civil
 20 Conspiracy.

21 **A. Legal Standard for a Motion to Dismiss**

22 A motion to dismiss pursuant to FEDERAL RULE OF CIVIL PROCEDURE
 23 (“FRCP”), RULE 12(b)(6) tests the sufficiency of the complaint. *Ileto v. Glock Inc.*,
 24 349 F.3d 1191, 1199-1200 (9th Cir. 2003). The standard of reviewing the
 25 sufficiency of a complaint under FRCP RULE 12(b)(6) is broader than it was
 26 previously thought to be. A complaint must allege enough facts to state a claim that
 27 is plausible, not merely conceivable. *Bell Atlantic Corp. v. Twombly*, 127 S.Ct.
 28 1955, 1974 (2007). Moreover, “the court is not required to accept legal conclusions

1 cast in the form of factual allegations if those allegations cannot reasonably be
 2 drawn from the facts alleged.” *Clegg v. The Clerk’s Awareness Network*, 18 F.3d
 3 752, 754-755 (9th Cir. 1994); *Cholla Readimix, Inc. v. Civish*, 382 F.3d 969, 973
 4 (9th Cir. 2004); *see also Twombly*, 127 S.Ct. at 1964-65.

5 **B. Rosa Galindo’s Second Claim for Negligence Against**
 6 **Homecomings Is Not Allowed Under California Law**

7 Rosa Galindo has alleged that Homecomings is a lender on her loans. (SAC
 8 ¶¶5, 28.) The borrower/lender relationship is one of the purest examples of the
 9 relationship governed by contracts. Decidedly, Rosa Galindo alleges she entered
 10 into the loans via written contracts. (SAC ¶14.) It is well established under
 11 California law that, in an action involving contractual relationships between parties,
 12 tort damages are not recoverable. The California Supreme Court, in *Foley v.*
 13 *Interactive Data Corp.*, 47 Cal.3d 654, 254 Cal.Rptr. 211 (1998), held that where
 14 relationships between parties are fundamentally contractual, contract, and not tort,
 15 damages are the appropriate remedy.

16 The case law confirms this principle. “[T]he economic loss rule ‘prevent[s]
 17 the law of contract and the law of tort from dissolving one into the other.’”
 18 *Robinson Helicopter Co., Inc.*, 34 Cal.4th 979, 988, 22 Cal.Rptr.3d 352 (2004)
 19 (*quoting Rich Products Corp. v. Kemutee, Inc.*, 66 F.Supp.2d 937, 969 (E.D. Wis.
 20 1999)). The court in *Erlich v. Menezes*, 21 Cal.4th 543, 551, 87 Cal.Rptr.2d 886
 21 (1999) held that “conduct amounting to a breach of contract becomes tortious only
 22 when it also violates a duty independent of the contract arising from principles of
 23 tort law.” In another previous decision, the court in *Brown v. California Pension*
 24 *Administration & Consultants, Inc.*, 45 Cal.App.4th 333, 346, 52 Cal.Rptr.2d 788
 25 (1996), held that “the Supreme Court has rejected the transmutation of contract
 26 actions into tort actions ‘in favor of a general rule precluding tort recovery for non-
 27 insurance contract breach, at least in the absence of violation of an ‘independent
 28 duty arising from principles of tort law.’” *Brown*, 45 Cal.App.4th at 346 (quoting

1 in part *Freeman & Mills v. Belcher Oil Company*, 11 Cal.4th 85, 44 Cal.Rptr.2d 42
 2 (1995)).

3 In *Freeman & Mills v. Belcher Oil Company*, 11 Cal.4th 85, 44 Cal.Rptr.2d
 4 42 (1995), the California Supreme Court reaffirmed the principle and held that tort
 5 theories of recovery are allowed in breach of contract actions in very limited
 6 situations. The *Freeman & Mills* court essentially held that the only situation in
 7 which a tort theory is allowed in a breach of contract situation is in the insurance
 8 area.

9 Our decisions in *Foley, Hunter and Applied Equipment*
 10 each contain language that strongly suggest courts should
 11 limit tort recovery in contract breach situations to the
 insurance area, at least in the absence of violation of an
 independent duty arising from principles of tort law ...

12 *Freeman & Mills v. Belcher Oil Company*, 11 Cal.4th 85, 95, 44 Cal.Rptr.2d 42
 13 (1995). The court in *Freeman & Mills* also noted the “special relationship”
 14 particular to insurance companies and their insureds was the basis for allowing tort
 15 recovery:

16 In holding that a tort action is available for breach of the
 17 covenant in an insurance contract, we have emphasized the
 18 ‘special relationship’ between insurer and insured,
 characterized by elements of public interest, adhesion and
 fiduciary responsibility.

19 *Freeman & Mills*, 11 Cal.4th at 91.

20 Rosa Galindo has failed to allege a violation of an independent duty arising
 21 from principles of tort law. Homecomings and Rosa Galindo’s relationship is
 22 governed by contract. Homecomings is not her insurer. Thus, the “special
 23 relationship” noted within *Freeman & Mills* is absent here.

24 Moreover, Homecomings has no other special relationship with her, such as a
 25 fiduciary relationship. Case law holds that no fiduciary relationship exists as
 26 between a debtor and a creditor—it is black letter law that a lender does not owe a
 27 fiduciary duty to its borrower. *See, e.g., Nymark v. Hart Federal Savings & Loan*
 28 *Assoc.*, 231 Cal.App.3d 1089, 1092, n.1 (1991) (“The relationship between a lending

1 institution and its borrower-client is not fiduciary in nature."); *Copesky v. Superior*
 2 *Court*, 229 Cal.App.3d 678, 693, n.14 (Cal. Ct. App. 1991) (cautioning against the
 3 "loose characterization" of financial relationships as fiduciary, quasi-fiduciary or
 4 fiduciary-like because, ordinarily, in these relationships, the bank is in no sense a
 5 true fiduciary); *Price v. Wells Fargo Bank*, 213 Cal.App.3d 465, 476 (1989) ("[I]t
 6 has long been regarded as 'axiomatic' that the relationship between a bank and its
 7 depositor arising out of a general deposit is that of a debtor and creditor. A debt is
 8 not a trust and there is not a fiduciary relationship between the debtor and the
 9 creditor as such."). There simply is no basis for a tort claim of negligence against
 10 Homecomings; no amendment will salvage this claim and this motion to dismiss
 11 should be granted without leave to amend.

12 **C. Rosa Galindo's Third Claim for Violation of TILA is Invalid**

13 **1. Rosa Galindo's TILA Claim is Barred by the Statute of
 14 Limitations**

15 The statute of limitations for a TILA claim is one year. (15 U.S.C. §1640(e).)
 16 Rosa Galindo alleges that she signed the loan papers for both loans on or about May
 17, 2006 and the escrow closed on or about May 23, 2006. (SAC ¶14.) Rosa
 18 Galindo filed her original complaint in state court on June 29, 2007 and it was
 19 removed to this court on August 2, 2007. Rosa Galindo's TILA claim is premised
 20 on the idea that she failed to receive the disclosures required by the statute. Thus,
 21 her claim would accrue on May 17, 2006 (or at the latest, on May 23, 2006, the date
 22 escrow closed) when she did not receive the documents. Simply, Rosa Galindo has
 23 not brought her action within one year of the date she executed the loan documents
 24 or when the escrow closed, so it is time-barred.

25 Rosa Galindo cannot allege, with a straight face, that she was unaware she did
 26 not receive the documents by May 17, 2006 (or May 23, 2006). If Homecomings
 27 failed to deliver a required document at execution, she would know that she did not
 28 receive it. Rosa Galindo's allegation that the statute of limitation is tolled is of no

1 import. (SAC ¶34.) “However, the court is not required to accept legal
 2 conclusions cast in the form of factual allegations if those conclusions cannot
 3 reasonably be drawn from the facts alleged.”” *Cholla Ready Mix*, 382 F.3d at 973
 4 (quoting *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994));
 5 *Taylor v. F.D.I.C.*, 132 F.3d 753, 762 (D.C. Cir. 1997) (“Courts accept plaintiffs’
 6 allegations of fact, not their conclusions of law”). Rosa Galindo’s “tolling”
 7 allegations provide no basis for explaining why the statute of limitations should be
 8 tolled. Thus, her claim is time-barred, cannot be revised and should be dismissed
 9 without leave.

10 **2. TILA Does Not Apply to Rosa Galindo’s Loans**

11 Rosa Galindo’s TILA claim is also barred because the statute simply does not
 12 apply under the facts she has alleged. She alleges that the loans were obtained on
 13 investment properties—a fourplex and a rental house where she has not alleged she
 14 resides. (SAC ¶13.) Neither of those properties was her home. The two loans on
 15 the Manon and Sheppard properties were for business purposes, not personal
 16 consumer purposes. “The Truth-in-Lending Act specifically exempts from its scope
 17 extensions of credit for business or commercial purposes.” *Poe v. First Nat. Bank of*
 18 *DeKalb County*, 597 F.2d 895, 896 (5th Cir. 1979) (*citing* 15 U.S.C §1603(1) and
 19 12 C.F.R. §226.3(a)); *Gombosi v. Carteret Mortg. Corp.*, 894 F.Supp. 176, 180
 20 (E.D. Penn. 1995). Loans for rental properties are business purposes under TILA:
 21 “Plaintiffs intended to rent the apartments and derive revenues therefrom. . . .
 22 Extensions of credit for such purposes were not intended by Congress to come
 23 within the purview of the Truth In Lending Act.” *Sapenter v. Dreyco, Inc.*, 326
 24 F.Supp. 871, 873 -874 (D. La. 1971), *affirmed* 450 F.2d 941, *certiorari denied* 92
 25 S.Ct. 1775, 406 U.S. 920, 32 L.Ed.2d 120. Thus, TILA does not apply.

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28 ///

1 **D. RESPA Does Not Apply to Rosa Galindo's Loans so her Fourth**
 2 **Claim for Violation of RESPA Is Invalid**

3 Like TILA, RESPA “does not apply to credit transactions involving
 4 extensions of credit - (1) primarily for business, commercial, or agricultural
 5 purposes” 12 U.S.C. §2606(a). In fact, RESPA specifically provides that “the
 6 exemption for credit transactions involving extensions of credit primarily for
 7 business, commercial, or agricultural purposes . . . shall be the same as the
 8 exemption for such credit transactions under 1603(1) of Title 15 [TILA].” 12
 9 U.S.C. §2606(b). Thus, for the same reasons Rosa Galindo's TILA claim is invalid
 10 (i.e., the loans were for business purposes), her RESPA claim is invalid. It should
 11 therefore be dismissed.

12 **E. Rosa Galindo's Ninth Cause of Action for Violation of the CLRA**
 13 **Does Not Apply Because: 1) a Mortgage Loan is Not a Good or Service Under**
 14 **the Statute, 2) a Mortgage Loan is Not a Consumer Transaction and 3) a**
 15 **Mortgage Loan Is Not Obtained Through a Sale or Lease**

16 The CLRA protects “consumers against unfair and deceptive business
 17 practices and to provide efficient and economical procedures to secure such
 18 protection.” Cal. CIV. CODE §1760. The CLRA is triggered only by “unfair or
 19 deceptive acts or practices undertaken by any person in a transaction intended to
 20 result or which results in the sale or lease of goods or services to any consumer . . .
 21 .” Cal. CIV. CODE §1770(a); *see also Berry v. American Exp. Publishing, Inc.*, 147
 22 Cal.App.4th 224, 228, 54 Cal.Rptr.3d 91 (2007).

23 **1. The CLRA Does Not Apply Because a Mortgage Loan Is Not**
 24 **a Good or Service**

25 First, a mortgage loan simply is not covered under the CLRA. In fact, “Early
 26 drafts of section 1761, subdivision (d), defined “Consumer” as “an individual who
 27 seeks or acquires, by purchase or lease, any goods, services, *money, or credit* for
 28 personal, family or household purposes.” [Emphasis in original.] *Berry*, 147

1 Cal.App.4th at 230 (citing Assem. Bill No. 292 (1970 Reg. Sess.) Jan. 21, 1970).
 2 However, the references to money and credit were removed and are not in the
 3 current statute. *Berry*, 147 Cal.App.4th at 230; Cal. CIV. CODE §§1770(a) and
 4 1761(d). In California law, if the Legislature rejects and does not adopt a specific
 5 statutory provision, the act should not be interpreted as to include the deleted
 6 provision. *Berry*, 147 Cal.App.4th at 230 (quoting and citing *Gikas v. Zolin*, 6
 7 Cal.4th 841, 861, 25 Cal.Rptr.2d 500, (1993); *Wilson v. City of Laguna Beach*, 6
 8 Cal.App.4th 543, 555, 7 Cal.Rptr.2d 848 (1992); *Rich v. State Board of Optometry*,
 9 235 Cal.App.2d 591, 607, 45 Cal.Rptr. 512 (1965)). The removal of the words
 10 “money” and “credit show that the CLRA does not apply to mortgage loans and that
 11 a mortgage loan is not a “good or service.”

12 Indeed, the *Berry* court held that “We conclude neither the express text of
 13 CLRA nor its legislative history supports the notion that credit transactions separate
 14 and apart from any sale or lease of goods or services are covered under the act.”
 15 *Berry*, 147 Cal.App.4th at 233. Since the California legislature deleted “money” and
 16 “credit” from the proposed language of the CLRA it is conclusive that it intended to
 17 exclude loans from the CLRA. Rosa Galindo has only alleged she received a loan
 18 from Homecomings. Legally, a mortgage loan simply is not covered under the
 19 CLRA.

20 Further, the CLRA only applies to transactions involving “goods or services. . .
 21 . . .” Cal. CIV. CODE §1770(a). Also, a consumer is defined as “individual who seeks
 22 or acquires, by purchase or lease, any goods or services for personal, family, or
 23 household purposes.” Cal. CIV. CODE §1761(d). These statutory provisions do not
 24 include an extension of credit or the loaning of money. Rosa Galindo has not
 25 otherwise alleged any facts showing that she has engaged in a transaction involving
 26 the lease of goods or services that are covered under the statute; a mortgage loan is
 27 not a “good” or “service” under the CLRA statute. Her conclusory allegation that a
 28 loan is a service for personal or household purposes must be disregarded. *See, e.g.*,

1 *Clegg*, 18 F.3d at 754-755. Indeed, under *McKell v. Washington Mut., Inc.*, 142
 2 Cal.App.4th 1457, 1488, 49 Cal.Rptr.3d 227 (2006), a case directly on point, her
 3 claim is barred.

4 In *McKell*, the plaintiffs alleged they obtained federally related mortgages
 5 from the defendant lender to purchase their homes. In connection with the loans, the
 6 lender charged fees for underwriting and wire transfers that were in excess of the
 7 lender's costs. The lender demurred to the plaintiffs' complaint. The trial court
 8 sustained the demurrers and the appellate court affirmed the decision. The appellate
 9 court reasoned:

10 Plaintiffs cite no authority or make no argument
 11 demonstrating that Washington Mutual's actions were
 12 undertaken "in a transaction intended to result or which
 13 results in the sale or lease of goods or services."
 14 (Civ.Code, § 1770, subd. (a), *italics added*.) Rather, its
 15 actions were undertaken in transactions resulting in the
 16 sale of real property. The CLRA thus is inapplicable

17 *McKell*, 142 Cal.App.4th at 1488 [footnote omitted]. The court also noted that:

18 The CLRA defines "goods" as "tangible chattels bought or
 19 leased for use primarily for personal, family, or household
 20 purposes" . . . [and] "services" as "work, labor, and
 21 services for other than a commercial or business use,
 22 including services furnished in connection with the sale or
 23 repair of goods."

24 *McKell*, 142 Cal.App.4th at 1488 fn.11.

25 Rosa Galindo has only alleged that Homecomings was the lender on a loan
 26 she obtained to refinance her two properties. Like in *McKell*, she has not alleged
 27 any facts which show that a good or service was involved. Under *McKell*, merely
 28 lending money is not actionable under the CLRA. Other cases involving the
 extension of credit under credit cards is in accord: "We conclude neither the express
 text of CLRA nor its legislative history supports the notion that credit transactions
 separate and apart from any sale or lease of goods or services are covered under the
 act." *Berry*, 147 Cal.App.4th at 233.

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2. The CLRA Does Not Apply Because a Mortgage Loan Is Not a Consumer Transaction

Second, as set forth above, this was a business and not a consumer transaction. Again, a consumer is defined as “individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes.” Cal. CIV. CODE §1761(d). She alleges that the loans were obtained on investment properties—a fourplex and a rental house where she has not alleged she resides. (SAC ¶13.) The loan was not used to acquire something for “personal, family, or household purposes.” Thus, the CLRA does not apply.

3. The CLRA Does Not Apply Because a Mortgage Loan Is Not Obtained Through a Sale or Lease

The CLRA only applies to a person who seeks a “good or service” through a “sale or lease.” Cal. CIV. CODE §1770(a); CIV. CODE §1761(d) (applies to “purchase or lease”). A mortgage loan is not related to a sale or lease under the CLRA. A “sale” consists of the passing of title from the seller to the buyer for a price. *See, e.g.*, Cal. COM. CODE §2106. The lender does not acquire title to the property from a mortgage loan refinance:

Generally, a deed of trust creates a tripartite relationship between the trustor (debtor), the trustee, and the beneficiary (creditor). Under such an agreement, the ordinary trust deed conveys the legal title to the trustee only so far as may be necessary to the execution of the trust.

Lupertino v. Carbahal, 35 Cal. App.3d 742, 747-748, 111 Cal.Rptr. 112 (1973). The lender merely has a lien on the property that transfers no title. *Monterey S. Partnership v. W.L. Bangham, Inc.*, 49 Cal.3d 454, 460, 261 Cal. Rptr. 587 (1989) (“In practical effect, if not in legal parlance, a deed of trust is a lien on the property”); Cal. Civ. CODE §2888 (“a lien . . . transfers no title to the property subject to the lien”). Since legally, there was no transfer of title, there can be no sale

1 for purposes of the CLRA. Plaintiff has failed to allege any facts indicating
 2 otherwise.

3 Moreover, the mortgages are not obtained through leases. "Provisions for the
 4 payment of rent and a transfer of use and possession of property are essential
 5 elements of a lease. *Santa Monica Rent Control Bd. v. Bluvshtein*, 230 Cal. App. 3d
 6 308, 316, 281 Cal.Rptr. 298 (1991). A mortgage ordinarily does not require
 7 payment of rent to obtain it and Rosa Galindo has not alleged that her loans are
 8 anything but normal mortgages. There also was not a transfer of use and possession
 9 relating the loan—Rosa Galindo had possession before the loan and still retains
 10 possession and title. A loan is not a lease or sale. *See, e.g., U.S. v. Investors*
 11 *Diversified Services*, 102 F.Supp. 645, 647 (D.C. Minn. 1952) ("It is difficult to
 12 conceive of a transaction for a loan of money as being a lease, sale, or contract for
 13 sale of a commodity"). Since the CLRA cannot apply to mortgage loans, this claim
 14 should be dismissed without leave to amend.

15 **F. Rosa Galindo Has Not Alleged Facts to State Her Twelfth Claim
 16 for Civil Conspiracy**

17 There is no independent claim for conspiracy under California law. *Applied*
 18 *Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 510, 28 Cal.Rptr.2d
 19 475 (1994). To be liable for conspiracy, Homecomings must participate with
 20 another who committed a tort; mere knowledge that another party committed a tort
 21 is insufficient. *Kidron v. Movie Acquisition Corp.*, 40 Cal.App.4th 1571, 1582, 47
 22 Cal.Rptr.2d 752 (1995).

23 Rosa Galindo fails to allege that Homecomings participated in a tort with the
 24 other defendants. She has alleged that Financo and the individual defendants were
 25 the defendants that misrepresented the terms of the loans to her, but did not allege
 26 Homecomings participated in those actions. There has to be two parties conspiring
 27 with each other to state a claim. *Kidron*, 40 Cal.App.4th at 1582. Rosa Galindo
 28 simply has not alleged any interaction between Homecomings and any other

1 defendant to commit any wrongful action. Rosa Galindo has alleged no agreements
 2 between Homecomings and any other defendant or that it performed any wrongful
 3 actions directly to her to meet the elements of the claim. *See Kidron*, 40 Cal.App.4th
 4 at 1581; *see also Applied Equipment*, 7 Cal.4th at 511. Thus, this claim should be
 5 dismissed.

6 **IV. CONCLUSION**

7 Rosa Galindo has not alleged valid claims against Homecomings for her: 1)
 8 Second Claim for Negligence; 2) Third Claim for violation of TILA; 3) Fourth
 9 Claim for violation of RESPA; 4) Ninth Cause of Action for Violation of the CLRA;
 10 and 5) Twelfth Claim for Civil Conspiracy. Each of these claims has fatal legal or
 11 factual flaws that cannot be salvaged and these claims should be dismissed, without
 12 leave to amend.

13
 14 DATED: January 15, 2008

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 16 By /s/ Frederick A. Haist

17
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 19 FREDERICK A. HAIST
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 22 erroneously sued as Homecomings Financial
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